A

TAY HONG SAN & ORS v. WOOLLEY DEVELOPMENT SDN BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
UMI KALTHUM ABDUL MAJID JCA
B ZALEHA YUSOF JCA
[CIVIL APPEALS NO: P-02-774-2011,
W-02-1822-2011 & W-02-1236-06-2012]
11 JANUARY 2018

C ***CONTRACT:*** *Sale and purchase agreement – Validity and enforceability of agreements – Agreement executed between developer and purchaser for shop lot project – Project abandoned and rehabilitating developer took over project from initial developer – Whether rehabilitating developer bound by terms of agreement between purchaser and initial developer – Purchasers not listed in transfer agreement*
D *– Whether purchasers executed novation agreement with rehabilitating developer – Whether privity of contract arose – Whether purchasers could claim for damages – Whether purchasers had right to enforce agreement against rehabilitating developer*

CONTRACT: *Privity – Sale and purchase agreement – Agreement executed between developer and purchaser for shop lot project – Project abandoned and*
E *rehabilitating developer took over project from initial developer – Whether rehabilitating developer bound by terms of agreement between purchaser and initial developer – Purchasers not listed in transfer agreement – Whether purchasers executed novation agreement with rehabilitating developer – Whether privity of contract arose – Whether purchasers could claim for damages – Whether purchasers*
F *had right to enforce agreement against rehabilitating developer*

LAND LAW: *Sale of properties – Developers – Sale and purchase agreement – Validity and enforceability of agreements – Agreement executed between developer and purchaser for shop lot project – Project abandoned and rehabilitating developer taking over project from initial developer – Whether rehabilitating developer bound*
G *by terms of agreement between purchaser and initial developer – Purchasers not listed in transfer agreement – Whether purchasers executed novation agreement with rehabilitating developer – Whether privity of contract arose – Whether purchasers could claim for damages – Whether purchasers had right to enforce agreement against rehabilitating developer*

H There were three appeals: Appeal 1182, Appeal 1236 and Appeal 774. Appeal 1822 was the appeal from three civil suits which were consolidated at the High Court. In all the three said civil suits, Cherating Development Sdn Bhd ('Cherating') and Woolley Development Sdn Bhd ('Woolley') were the first and second defendants respectively. With the agreement of parties,
I Appeals 1822 and 1236 were heard first, followed with Appeal 774. In Appeal 1822, the appellants ('the plaintiffs') entered into 12 separate sale and

purchase agreements ('SPAs') with Cherating and each SPA was for the purchase of each floor in the respective shop lots ('the properties'). Pursuant to the terms of the SPAs, Cherating agreed to deliver vacant possession of the properties within 36 months of the date of the SPAs. Cherating was liable to pay liquidated and ascertained amount of damages for delay in delivering vacant possession ('LAD'). It was alleged that the plaintiffs had paid Cherating the total purchase price of the properties. Subsequently, the project was abandoned by Cherating and was later taken over by Woolley. As a mechanism for takeover, Cherating and Woolley entered into an agreement for transfer of land ('transfer agreement') where Woolley agreed to rehabilitate and to continue to develop and complete the project subject to the terms and conditions therein. Cherating had also signed a deed of novation with Malaysia Building Society Berhad ('MBSB'') being the financier for the project and chargee of the land to novate its liabilities with MBSB. In the transfer agreement, Cherating disclosed the shop lot units that had been sold to individuals as particularised in annexure H. It was the plaintiffs' case that the defendants had breached the terms of the SPAs by failing to deliver vacant possession within the stipulated time period. The plaintiffs sought to enforce the SPAs by claiming, amongst others, a declaration that Woolley was bound by the terms of the SPAs and an order for specific performance of the SPAs against Cherating/Woolley to deliver vacant possession of the properties. Woolley, however, argued that the plaintiffs were not amongst the list of purchasers provided by Cherating and that the plaintiffs did not execute any agreement with Woolley and therefore there was no legally binding relationship between the plaintiffs and Woolley. At the High Court, the trial judge found that the plaintiffs had not discharged their burden of proof that they had made payments for the properties and dismissed the plaintiffs' claims. The plaintiffs thus appealed. Two issues arose herein (i) whether the plaintiffs were precluded from making their claims against Woolley since they were not listed in annexure H to the transfer agreement and (ii) since the plaintiffs had obtained judgments in default of appearance by Cherating (JIDs) which had not been set aside, whether the JIDs were binding on Woolley.

In Appeal 1236, the appellant/Lay Kim Piaw (deceased) ('plaintiff') entered into four sale and purchase agreements (SPAs) with Cherating for the purchase of each floor in the shop lot in respect of the land developed by Cherating. The plaintiff allegedly paid Cherating the total price of RM936,580. At the High Court, the plaintiff contended that the sale transactions of the properties were actually pursuant to a private arrangement between the plaintiff and Cherating whereby it was agreed that the purchase price for the properties would be to contra with goods delivered by the plaintiff to Cherating for the sum of RM536,000 and the difference of RM400,000 was paid in cash to one Datuk Jeffrey Cheah. The trial judge,

however, found that the plaintiff had not discharged his burden of proof that he had made payments for the properties and since the plaintiff was not listed in annexure H to the transfer agreement, the plaintiff had not entered into any new sale and purchase agreements with Woolley, and thus there was no privity of contract between the plaintiff and Woolley. The High Court therefore dismissed the plaintiff's claim. The plaintiff appealed against that decision.

In Appeal 774, the appellants ('plaintiffs') contended that, pursuant to four sale and purchase agreements ('SPAs'), they had agreed to purchase one unit of shop lot comprising the ground, first, second and third floors ('project'). Pursuant to the SPAs, Cherating agreed to deliver vacant possession of the properties within 36 months of the date of the SPAs and the plaintiffs had paid Cherating an initial deposit. Pursuant to a letter (D7), Woolley had informed the plaintiffs that it had taken over the project from Cherating. The plaintiffs contended that they had agreed to pay the balance purchase price. However, Woolley had failed to issue any notice of payment under the SPAs. Instead, Woolley had completed the project/properties and sold it to third parties without the plaintiffs' knowledge and consent. The plaintiffs argued that Woolley had therefore breached the terms of the SPAs and the plaintiffs sought to enforce the SPAs by claiming, amongst others, for an order of specific performance of the SPAs and LAD. Woolley, on the other hand, had issued a letter ('D11') to the plaintiffs urging them to confirm in writing whether they intended to purchase the properties, failing which Woolley would deem the plaintiffs were no longer interested in the properties. The High Court Judge found that, when D7 was read together with the transfer agreement, Woolley was the successor in title and permitted assign of Cherating. However, the trial judge also found that as there was no novation agreement executed between Cherating, Woolley and the plaintiffs, Woolley was not bound by the SPAs. The High Court thus dismissed the plaintiffs' claim in its entirety. Hence, the plaintiffs appealed.

Held (dismissing appeals)

Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:

(1) The lodgement of the private caveats on the properties by the plaintiffs did not signify conclusively that the plaintiffs had a right to the properties. The presence of the caveats merely showed that the plaintiffs were making a claim on the properties and not that they had titles to the properties. The plaintiffs were not listed as caveators in annexure C to the transfer agreement. In fact, the plaintiffs had lodged their caveats in the year 2001. So the plaintiffs' rights/titles to the properties were never in the contemplation of Cherating and Woolley when they entered the transfer agreement in the year 2000. (paras 22 & 23)

(1a) The plaintiffs were not listed in annexure H to the transfer agreement. Neither did the plaintiffs execute any novation agreement with Woolley. Thus, there was no privity of contract between the plaintiffs and Woolley to enable Woolley to be held responsible to transfer the properties to the plaintiffs let alone for damages for LAD. (para 23)

(1b) Since the judgments in default (JID) were obtained by the plaintiffs against Cherating, which was since be wound up, the enforcement of the JIDs would have to be against the estate of Cherating and not against Woolley. Thus, Appeal 1822 was dismissed. (paras 25 & 26)

(2) As the facts and issues of Appeal 1236 were very similar, if not the same as in Appeal 1822, this court adopted the reasons as laid out in Appeal 1822 with such necessary modifications as were required. Therefore, Appeal 1236 was also dismissed. (para 36)

(3) Having perused the appeal record and submissions of the parties, there was no need to differ from the High Court's findings of facts. Woolley had categorically disputed the plaintiffs' assertion that the SPAs were binding and specifically pleaded that the plaintiffs had no right to enforce the SPAs against Woolley. Moreover, the plaintiffs could not reprobate and approbate the *ultimatum* letter D11 in the sense that they had denied receiving it (which this court agreed with the finding of the trial judge that they did indeed receive it) and yet went on to argue at length that D11 was a termination letter of the SPAs and that Woolley had wrongfully terminated the SPAs and sold the properties to third parties. There were no merits in this appeal. Thus, Appeal 774 was dismissed. (paras 50, 52 & 53)

Bahasa Malaysia *Headnotes*

Terdapat tiga rayuan: Rayuan 1182, Rayuan 1236 dan Rayuan 774. Rayuan 1822 adalah rayuan daripada tiga guaman sivil yang digabungkan di Mahkamah Tinggi. Dalam ketiga-tiga guaman sivil tersebut, Cherating Development Sdn Bhd ('Cherating') dan Woolley Development Sdn Bhd ('Woolley') adalah defendan pertama dan kedua. Dengan persetujuan pihak-pihak terlibat, Rayuan 1822 dan 1236 didengar dahulu, diikuti dengan Rayuan 774. Dalam Rayuan 1822, perayu-perayu ('plaintif-plaintif) memasuki 12 perjanjian jual beli yang berbeza ('PJB') dengan Cherating dan setiap PJB adalah untuk pembelian setiap tingkat dalam lot kedai masing-masing ('hartanah-hartanah'). Menurut syarat-syarat PJB, Cherating bersetuju menyerahkan milikan kosong hartanah-hartanah dalam tempoh 36 bulan dari tarikh PJB. Cherating bertanggungjawab membayar dan menjelaskan jumlah ganti rugi tertentu untuk kelewatan menyerahkan milikan kosong ('LAD'). Adalah didakwa bahawa plaintif-plaintif telah membayar Cherating jumlah penuh harga hartanah-hartanah itu. Seterusnya,

projek telah terbiar oleh Cherating dan diambil alih oleh Woolley. Sebagai mekanisme pengambilanalih, Cherating dan Woolley memasuki satu perjanjian untuk pindah milik tanah ('perjanjian pindah milik') dan Woolley bersetuju memulihkan dan meneruskan pembangunan serta menyelesaikan projek tertakluk pada syarat-syarat. Cherating juga telah menandatangani satu perjanjian novasi dengan Malaysia Building Society Berhad ('MBSB') sebagai pembiaya projek dan pemegang gadaian tanah bagi mengemas kini liabiliti-liabilitinya dengan MBSB. Dalam perjanjian pindah milik, Cherating mendedahkan unit lot-lot kedai yang telah dijual kepada individu-individu seperti yang ditetapkan dalam lampiran H. Adalah kes plaintif bahawa defendan-defendan telah melanggar syarat-syarat PJB kerana gagal menyerahkan milikan kosong dalam tempoh masa yang ditetapkan. Plaintif-plaintif menuntut untuk menguatkuasakan PJB dengan memohon, antara lain, pengisytiharan bahawa Woolley terikat dengan syarat-syarat PJB dan satu perintah pelaksanaan spesifik PJB terhadap Cherating/Woolley untuk menyerahkan milikan kosong hartanah-hartanah. Woolley, walau bagaimanapun, menghujahkan bahawa plaintif-plaintif tidak terdapat dalam senarai yang dibekalkan oleh Cherating dan plaintif-plaintif tidak melaksanakan mana-mana perjanjian dengan Woolley dan dengan itu, tiada hubungan mengikat secara sah antara plaintif-plaintif dan Woolley. Di Mahkamah Tinggi, hakim bicara mendapati plaintif-plaintif tidak melepaskan beban pembuktian mereka bahawa mereka telah membuat bayaran untuk hartanah-hartanah tersebut dan menolak tuntutan plaintif-plaintif. Dengan itu plaintif-plaintif merayu. Dua isu yang timbul adalah (i) sama ada plaintif-plaintif dikecualikan daripada membuat tuntutan terhadap Woolley kerana mereka tidak tersenarai dalam lampiran H perjanjian pindah milik; dan (ii) oleh kerana plaintif-plaintif telah memperoleh penghakiman ingkar ('PI') oleh Cherating yang tidak diketepikan, sama ada PI terikat atas Woolley.

Dalam Rayuan 1236, perayu/Lay Kim Piaw ('si mati') ('plaintif') memasuki empat perjanjian jual beli ('PJB') dengan Cherating untuk pembelian setiap tingkat dalam lot kedai tanah yang dibangunkan oleh Cherating. Plaintif mendakwa telah membayar Cherating jumlah penuh RM936,580. Di Mahkamah Tinggi, plaintif menghujahkan transaksi jualan hartanah-hartanah itu adalah menurut aturan peribadi antara plaintif dan Cherating yang telah bersetuju bahawa harga belian untuk hartanah-hartanah adalah dikontra dengan barangan-barangan yang diserahkan oleh plaintif kepada Cherating untuk jumlah RM536,000 dan perbezaan RM400,000 dibayar dengan wang tunai kepada seorang bernama Datuk Jeffrey Cheah. Hakim bicara, walau bagaimanapun, mendapati plaintif gagal melepaskan beban pembuktian bahawa dia telah membuat bayaran untuk hartanah-hartanah itu dan oleh kerana plaintif tidak tersenarai dalam senarai lampiran H perjanjian pindah

milik, plaintif tidak memasuki apa-apa perjanjian jual beli baru dengan Woolley, dan dengan itu tiada priviti kontrak yang wujud antara plaintif dan Woolley. Mahkamah Tinggi dengan itu menolak permohonan plaintif. Plaintif merayu terhadap keputusan itu.

Dalam Rayuan 774, perayu-perayu ('plaintif-plaintif') menghujahkan, menurut empat perjanjian jual beli ('PJB'), mereka telah bersetuju membeli satu unit lot kedai yang terdiri daripada tingkat bawah, pertama, kedua dan ketiga ('projek'). Menurut PJB, Cherating bersetuju menyerahkan milikan kosong dalam tempoh 36 bulan dari tarikh PJB dan plaintif-plaintif telah membayar Cherating satu deposit awal. Menurut surat ('D7'), Woolley telah memaklumkan kepada plaintif-plaintif bahawa Wooley telah mengambil alih projek tersebut dari Cherating. Plaintif-plaintif menghujahkan bahawa mereka bersetuju membayar baki harga belian. Walau bagaimanapun, Woolley gagal mengeluarkan notis bayaran bawah PJB. Sebaliknya, Woolley menyelesaikan projek/hartanah-hartanah itu dan menjualnya kepada pihak ketiga tanpa pengetahuan dan kebenaran plaintif-plaintif. Plaintif-plaintif menghujahkan Woolley melanggar syarat-syarat PJB dan plaintif-plaintif menuntut untuk menguatkuasakan PJB dengan memohon, antara lain, perintah pelaksanaan spesifik PJB dan LAD. Woolley, walau bagaimanapun, telah mengeluarkan surat ('D11') kepada plaintif-plaintif meminta mereka mengesahkan secara bertulis sama ada mereka mempunyai niat membeli hartanah-hartanah, dan jika gagal berbuat demikian, Woolley akan menganggap plaintif-plaintif tidak lagi berminat. Mahkamah Tinggi mendapati bahawa, apabila D7 dibaca bersama-sama dengan perjanjian jual beli, Woolley adalah pewaris hak milik yang dibenarkan Cherating. Hakim bicara juga mendapati bahawa oleh sebab tiada perjanjian novasi dilaksanakan antara Cherating, Woolley dan plaintif-plaintif, Woolley tidak terikat dengan PJB. Dengan itu Mahkamah Tinggi menolak tuntutan plaintif-plaintif secara keseluruhannya. Oleh itu, plaintif-plaintif merayu.

Diputuskan (menolak rayuan-rayuan)
Oleh Umi Kalthum Abdul Majid HMR menyampaikan penghakiman mahkamah:

(1) Kemasukan kaveat-kaveat persendirian atas hartanah-hartanah oleh plaintif-plaintif tidak membawa erti dengan pasti bahawa plaintif-plaintif mempunyai hak atas hartanah-hartanah itu. Kehadiran kaveat-kaveat hanya menunjukkan plaintif-plaintif sedang membuat tuntutan atas hartanah-hartanah itu dan tidak mempunyai hak milik atas hartanah-hartanah itu. Plaintif-plaintif tidak tersenarai sebagai pengkaveat-pengkaveat dalam lampiran C perjanjian pindah milik. Hakikatnya, plaintif-plaintif telah memasukkan kaveat-kaveat pada tahun 2001. Oleh itu, hak plaintif-plaintif ke atas hartanah-hartanah itu tidak pernah masuk dalam pertimbangan Cherating dan Woolley apabila mereka memeterai perjanjian pindah milik pada tahun 2000.

(1a) Plaintif-plaintif tidak tersenarai dalam lampiran H perjanjian pindah milik. Plaintif-plaintif juga tidak melaksanakan perjanjian novasi dengan Woolley. Oleh itu, tiada kontrak priviti timbul antara plaintif-plaintif dan Woolley untuk membolehkan Woolley bertanggungjawab memindah milik hartanah-hartanah itu kepada plaintif-plaintif dan untuk ganti rugi LAD.

(1b) Oleh kerana penghakiman ingkar ('PI') diperoleh plaintif-plaintif terhadap Cherating, yang telah digulungkan, penguatkuasaan PI harus terhadap estet Cherating dan bukan Woolley. Dengan itu, Rayuan 1822 ditolak.

(2) Oleh kerana fakta-fakta dan isu-isu Rayuan 1236 serupa dengan Rayuan 1822, mahkamah ini mengguna pakai alasan-alasan yang dibentangkan dalam Rayuan 1822 dengan pindaan-pindaan yang perlu seperti yang dikehendaki. Oleh itu, Rayuan 1236 adalah juga ditolak.

(3) Setelah meneliti rekod rayuan dan hujahan-hujahan pihak-pihak terlibat, tiada keperluan untuk mempertikaikan dapatan fakta Mahkamah Tinggi. Woolley telah mempertikaikan kenyataan plaintif bahawa PJB terikat dan telah memplidkan khususnya bahawa plaintif-plaintif tidak mempunyai hak menguatkuasakan PJB terhadap Woolley. Seterusnya, plaintif-plaintif tidak boleh reprobat dan aprobat surat D11 dan mendakwa mereka tidak menerimanya (mahkamah ini bersetuju dengan dapatan hakim bicara bahawa plaintif-plaintif telah menerimanya) tetapi terus menghujahkan D11 adalah surat pembatalan PJB dan Woolley telah dengan salah membatalkan PJB dan menjual hartanah-hartanah itu kepada pihak ketiga. Tiada merit dalam rayuan ini. Oleh itu, Rayuan 774 ditolak.

Case(s) referred to:

Affin Bank Bhd v. Mohd Kassim Ibrahim [2013] 1 CLJ 465 FC ***(refd)***

Beldeu Singh v. Dr Kenneth Andrew [2009] 1 LNS 659 CA ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Lee Ing Chin & Ors. v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Multar Masngud v. Lim Kim Chet & Anor [1982] CLJ 107; [1982] CLJ (Rep) 237 FC ***(refd)***

Tan Hood Keng v. ARP Aroonasalam Chetty & Anor [1912] 1 LNS 2 CA ***(refd)***

Vershures Creameries Ltd v. Hull and Netherlands Steamship Co Ltd [1921] 2 KB 608 ***(refd)***

Woolley Development Sdn Bhd v. Mikien Sdn Bhd [2008] 2 CLJ 303 CA ***(dist)***

Legislation referred to:

Contracts Act 1950, s. 26

Evidence Act 1950, ss. 32, 73A

Rules of the High Court 1980, O. 81

(Civil Appeal No: P-02-774-2011)
For the appellant - Balvinder Singh Kenth & S Annie Santha; M/s S Annie & Assocs
For the respondents - Cyrus V Das, Prakash Lachimanan, Syed Ismit Putra & Malarvily Perumal; M/s Mathews Hun Lachimanan

(Civil Appeal No: W-02-1822-2011)
For the appellant - Sulaiman Abdullah, Goik Kenzu & Goik Ah Kim; M/s Nasir, Kenzin & Tan
For the respondents - Cyrus V Das, Prakash Lachimanan, Syed Ismit Putra & Malarvily Perumal; M/s Mathews Hun Lachimanan

(Civil Appeal No: W-02-1236-06-2012)
For the appellant - Sulaiman Abdullah, Ramesh Sivakumar & Goik Ah Kim; M/s Ramesh & Loo
For the respondent - Cyrus V Das, Prakash Lachimanan, Syed Ismit Putra & Malarvily Perumal; M/s Mathews Hun Lachimanan

[Editor's note: Appeal from High Court; Civil Suits No: 22-786-2005, S-22-1206-2006, S1-22-1208-2006, S2-22-1209-2006 & S22-1207-2006 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Umi Kalthum Abdul Majid JCA:

Introduction

[1] There were three appeals before us. They were P-02-774-2011 (Appeal 774), W-02-1822-2011 (Appeal 1822) and W-02-1236-06-2012 (Appeal 1236). Appeal 774 originated from the High Court at Penang, whilst Appeal 1822 and Appeal 1236 originated from the High Court at Kuala Lumpur. Appeal 1822 was the appeal from three civil suits which were consolidated at the High Court; they were Civil Suit No. S-22-1206-2006 (Suit 1206) (Kean Yick Enterprise Sdn Bhd as plaintiff) (Kean Yick Enterprise), S1-22-1208-2006 (Suit 1208) (Aidai Timber Products Sdn Bhd as plaintiff) (Aidai) and S2-22-1209-2006 (Suit 1209) (Kean Yick Holdings Sdn Bhd as plaintiff) (Kean Yick Holdings). In all the three said civil suits, Cherating Development Sdn Bhd (Cherating) and Woolley Development Sdn Bhd (Woolley) were the first and second defendants respectively. (The three companies in the civil suits will be collectively referred to as "the companies".)

[2] With the agreement of parties, we heard Appeals 1822 and 1236 first, to be followed with Appeal 774.

[3] As the facts in each appeal differed to some extent, we will deal with each appeal separately.

A **Appeal 1822**

Brief Facts Common In All Three Suits

[4] The appellants in the Appeal 1822 are the plaintiffs in the three suits respectively (plaintiffs) whilst the first and second respondents are the same first and second defendants for all the three suits respectively (together "the B defendants). The issues raised in the three suits are identically the same.

[5] A property (the land) was developed by Cherating (first defendant), who was the registered proprietor (the project). On 5 November 1998, the appellants/plaintiffs entered into 12 separate sale and purchase agreements C (SPAs) with Cherating. Each SPA was for the purchase of each floor in the respective shop lots (the properties). All the SPAs were executed on behalf of the plaintiffs by a common director, Mr Lau Kim Lai (PW1), who was authorised by the plaintiffs' Directors Resolutions dated 9 October 1998 to sign these SPAs.

D **[6]** Pursuant to the terms of the SPAs, Cherating agreed to deliver vacant possession of the properties within 36 months of the date of the SPAs. Cherating was liable to pay liquidated and ascertained amount of damages at the rate of 11% per annum for delay in delivering vacant possession (LAD).

E **[7]** It was alleged that the plaintiffs had paid Cherating the total purchase price of the properties.

[8] Subsequently, the project was abandoned by Cherating since 1998. The project was later taken over by Woolley (second defendant). As a mechanism for takeover, Cherating and Woolley entered into an agreement F for transfer of land dated 20 September 2000 (transfer agreement), where Woolley agreed to rehabilitate and to continue to develop and complete the project subject to the terms and conditions therein.

[9] The land was not transferred to Woolley, but Woolley was given a power of attorney dated 26 September 2000, whereby Woolley was allowed G to exercise all the rights and powers of Cherating as the registered proprietor of the land, including but not limited to the signing of the sale and purchase agreement, transfer documents, building plans etc. that are necessary for the development. Cherating had also signed a deed of novation dated 21 June 2006 (deed of novation) with Malaysia Building Society Berhad (MBSB), H being the financier for the project and chargee of the land, to novate its liabilities with MBSB.

[10] In the transfer agreement, at recital L, Cherating disclosed the shop lot units that had been sold to individuals as particularised in annexure H therein.

I

[11] It was the plaintiffs' case that the defendants had breached the terms of the SPAs by failing to deliver vacant possession within the stipulated time period. The plaintiffs sought to enforce the SPAs by claiming, amongst others, the following reliefs:

(a) a declaration that Woolley is bound by the terms of the SPAs;

(b) order for specific performance of the SPAs, against Cherating/Woolley to deliver vacant possession of the properties;

(c) alternatively damages in addition to or *in lieu* thereof;

(d) judgment for a quantified sum of RM369,554.79, RM369,554.79 and RM673,772.30 respectively for liquidated damages for late delivery of vacant possession as at 30 April 2006;

(e) judgment for an unquantified sum for liquidated damages for late delivery of vacant possession from 1 May 2006 calculated at 11% per annum until date of delivery of vacant possession.

[12] It was the second defendant's/Woolley's defence that:

(a) by the transfer agreement and the deed of novation entered between Cherating, MBSB and Woolley, and subject to the terms thereof, Woolley had agreed to rehabilitate and complete the project;

(b) Woolley's obligation to rehabilitate and complete the project pursuant to the transfer agreement was conditional upon, amongst others, the existing purchasers giving their consent and/or agreement to permit Woolley to complete the project by executing a novation;

(c) the plaintiffs were not amongst the list of purchasers provided by Cherating;

(d) Woolley had no knowledge of the alleged payment of the full purchase price of the properties;

(e) the plaintiffs did not execute any agreement with Woolley and therefore there is no legally binding relationship between the plaintiffs and Woolley;

(f) Woolley therefore denied being bound by the terms of the SPAs.

At The High Court

[13] The learned judge addressed two issues to be decided by her as follows:

(a) whether there is a valid and enforceable contract between the plaintiffs and Woolley; and

(b) whether there is privity of contract between the plaintiffs and Woolley.

Valid And Enforceable Contract

[14] Notwithstanding the express terms of the SPAs, it was contended by the plaintiffs, *vide* the sole testimony of their witness, PW1, that the sale transactions of the properties were actually pursuant to a private arrangement between one of the directors of the plaintiffs, the late Lau Kim Piaw, and Cherating whereby it was agreed that the purchase price for the properties would be to contra with goods delivered by the plaintiffs to Cherating and the difference to be paid by cash. The plaintiffs relied primarily on three letters of acknowledgement all dated 15 October 1998 and marked as IDP5, IDP11 and IDP17 by Cherating to the respective plaintiffs (the impugned letters).

[15] The learned judge found that the plaintiffs had not discharged their burden of proof that they had made payments for the properties for the following reasons:

(a) PW1 did not have personal knowledge of the payments made as he claimed;

(b) PW1 was not a credible witness as he gave inconsistent evidence;

(c) on the balance of probabilities, the evidence adduced pointed to the irresistible conclusion that it was highly improbable that PW1 had any personal knowledge regarding the payments of the properties to Cherating;

(d) the court refused to admit the impugned letters and other documents, that is, the plaintiffs' Directors Resolution (IDP6, IDP12), the plaintiffs' solicitor's letters dated 5 February 2002 (IDP20) and the financial statements of the plaintiffs (IDP25 to IDP29) (collectively "impugned documents"), as exhibits of the court since all these documents were in Part C of the common bundle of documents where the makers of these documents were not called to testify as to their authenticity and contents; further these documents did not fall under the exceptions to s. 73A and s. 32 of the Evidence Act 1950 (Evidence Act);

(e) it was highly improbable for the impugned letters to be accepted as credible evidence since the plaintiffs were not listed as purchasers in annexure H to the transfer agreement. Further, the impugned letters were issued on 15 October 1998 when the project was abandoned in 1998, and according to DW3 at the time when Woolley took over the project in 2001, Cherating had merely completed the piling works whilst the structural and building works had not been completed. The question therefore arose as to why would the plaintiffs want to pay the full purchase price of the properties when the project had not been completed.

[16] In view of the above reasons, the learned judge found that the SPAs were void for want of consideration pursuant to s. 26 of the Contracts Act 1950 (Contracts Act) and the plaintiffs' claim were dismissed.

Privity Of Contract

[17] The learned judge had made a finding that there was no payment of the full purchase price by the plaintiffs, and since the plaintiffs were not listed in annexure H to the transfer agreement, and the plaintiffs had not entered into any new sale and purchase agreements with Woolley, there was no privity of contract between the plaintiffs and Woolley. The learned judge in doing so distinguished the facts of this case with that of this court's majority decision in the case of *Woolley Development Sdn Bhd v. Mikien Sdn Bhd* [2008] 2 CLJ 303 (*Mikien*'s case). In *Mikien*'s case, Woolley had appealed against the decision of the High Court allowing summary judgment under O. 81 of the Rules of the High Court 1980. This court had dismissed Woolley's appeal for failing to dispute a positive averment by Mikien that Woolley was the successor in title and permitted assign of Cherating and that the purchase price had been paid in full. Whereas in this case, Woolley had disputed that they were successors in title and permitted assigns of Cherating and thus cls. 41 and 38(f) of the SPAs are not binding on Woolley.

[18] The learned High Court Judge therefore found on the balance of probabilities, the plaintiffs had not proven their claims and proceeded to dismiss the plaintiffs' claims with costs to be taxed unless otherwise agreed and be borne equally by the plaintiffs in the three suits. The plaintiffs now appealed to this court against that decision.

Decision Of The Court

[19] Before us, learned counsel for the plaintiffs stressed on two issues. First, on whether the plaintiffs were precluded from making their claims against Woolley since they were not listed in annexure H to the transfer agreement? Second, since the plaintiffs had obtained judgments in default of appearance by Cherating (JIDs) dated 14 March 2007, 16 February 2007 and 31 January 2007 respectively, which had not been set aside, whether the JIDs are binding on Woolley?

[20] On the first issue, it was agreed for the plaintiffs that they had entered private caveats on the properties, which caveats, amongst others, were the subject of the Originating Summons No. 24-568-2007 (OS) filed by Woolley against them (amongst others) whereby Woolley applied to have all the caveats stated therein to be removed. In the affidavit in support of the OS affirmed by the Director of Woolley, Woo Yew Khuen, at para. 7, Woolley had categorically deposed that all the caveats listed in Schedule 1 should be removed, except for the caveats in respect of the lots listed in Schedule 2

therein. Amongst other caveats excepted from removal and as listed in Schedule 2 were the caveats lodged by the plaintiffs Kean Yick Holdings and Aidai. But by consent of parties, the caveat lodged by Kean Yick Enterprise was also excepted from removal *vide* amended consent order dated 17 January 2008. Therefore, it was argued, Woolley had recognised the plaintiffs' right to lodge the caveats on the properties.

[21] As for the JIDs, it was contended by the plaintiffs that since they had obtained the JIDs against Cherating, the JIDs would also bind Woolley which had taken over the responsibilities of Cherating and thereby Woolley is now required to deliver the properties to the plaintiffs *vis à vis* the SPAs with Cherating.

[22] With regard to the lodgement of the private caveats on the properties by the plaintiffs, we were of the view that the caveats did not signify conclusively that the plaintiffs have a right to the properties. We agreed with Woolley's counsel's submission that the presence of the caveats merely showed that the plaintiffs were making a claim on the properties and not that they have titles to the properties.

[23] It was noted by us that under the transfer agreement, para. C to the Recital, reference was specifically made to the existence of caveats lodged over the land held by Cherating, the particulars of which were described in annexure C thereto as follows:

> (C) Pursuant to a private title search conducted on 3rd August 2000, there are numerous private caveats lodged by individuals, corporation and financial institution over the Land to protect their respective interests. The particulars are described in Annexure C hereto.

The plaintiffs were not listed as caveators in annexure C thereto. In fact, the plaintiffs had lodged their caveats after the year 2000, that is in the year 2001. So the plaintiffs' rights/titles to the properties were never in the contemplation of Cherating and Woolley when they entered the transfer agreement in the year 2000. This was further borne out in paras. J, K and L of the Recital to the transfer agreement which provide as follows:

> J) By a letter dated 27th July 2000 addressed to CDSB, MBSB has agreed with CDSB's proposal in granting WDSB the rehabilitation and completion of the Project ("the Objective"), whereby CDSB will transfer the Land to WDSB subject to the existing Charges created in favour of MBSB without any money consideration. A copy of the letter is annexed in Annexure G.
>
> K) **To achieve the Objective, the parties together with MSBS further agreed to enter into *inter alia* the following Agreements** immediately upon execution of this Agreement on terms mutually agreed upon:

(i) Loan Agreement between WDSB and MBSB;

(ii) Guarantee Agreement from WDSN in favour of MBSB;

(iii) Restructuring Agreement between CDSB, CDSB's Directors and MBSB;

(iv) Assignment of Profits from CDSB in favour of MBSB;

(v) Tripartite Agreement between CDSB, WDSB and the MBSB;

(vi) Project Management Agreement between WDSB and MBSB;

(vii) **Novation of the S&P Agreements between CDSB, WDSB and the individual Purchasers (as herein defined);**

(viii) Assignment of the Compensation Agreements between CDSB, the Squatters and WDSB (as herein defined); and

(ix) Other relevant Agreements pertaining thereto.

L) *CDSB has by separate and individual Sale and Purchase Agreements made with the individual Purchasers ("individual Purchaser") ("S&P"), details of which are more particularly described in Annexure H, agreed to sell and transfer their rights and title to and interest in the relevant Unit erected or to be erected on part of the Land ("the Unit") to the individual Purchasers upon payment of full purchase price and the terms and conditions stipulated in the S&P.* (emphasis added)

The plaintiffs were not listed in annexure H to the transfer agreement. Neither did the plaintiffs execute any novation agreement with Woolley as contemplated by para. K (vii) of the Recital to the transfer agreement. We therefore came to the irresistible conclusion, as the learned High Court Judge did, that there was no privity of contract between the plaintiffs and Woolley to enable Woolley to be held responsible to transfer the properties to the plaintiffs let alone for damages for LAD etc. We agreed with the learned High Court Judge's finding that the facts of these cases *vis Mikien*'s case were distinguishable and did not bind Woolley in these cases.

[24] Other than finding that there was no privity of contract between the plaintiffs and Woolley, the learned High Court Judge also made a finding of fact that the plaintiffs had failed to prove that they had made payments of the purchase price to Cherating and that therefore the SPAs were void for want of consideration under s. 26 of the Contracts Act. It is trite law that an appellate court should be slow to intervene/overturn the finding of facts by the trial judge. (See *Multar Masngud v. Lim Kim Chet & Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237; [1982] 1 MLJ 184; *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163, *Beldeu Singh v. Dr. Kenneth Andrew* [2009] 1 LNS 659; [2011] 4 MLJ 769, *Lee Ing Chin & Ors. v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97). We did not see any need to refute the findings of facts made by the learned High Court Judge.

[25] With regard the JIDs obtained by the plaintiffs against Cherating, we agreed with the submission of Woolley that it could not have made any application to have the JIDs be set aside because Woolley was not the party against whom the JIDs were obtained. Since the JIDs were obtained against Cherating, which had since been wound up, the enforcement of the JIDs would have to be against the estate of Cherating and not against Woolley in view of our decision affirming the High Court Judge's decision, that there was no privity of contract between the plaintiffs and Woolley.

[26] In view of the above, we unanimously found that there was no merit in this appeal and we dismissed this appeal with costs of RM15,000 to Woolley/respondent. We ordered the deposit be refunded.

Appeal 1236

Brief Facts

[27] The appellant/Lau Kim Piaw/the deceased in Appeal 1236 was the plaintiff in Civil Suit No. S22-1207-2006 (Suit 1207) whilst Cherating and Woolley were the first and second defendants respectively. Suit 1207 was one of the four suits which were originally ordered to be heard together. However, during case management, the High Court was informed that the plaintiff had passed away. Suit 1207 was subsequently confirmed by the executrix of the estate of Lau Kim Piaw, that is, Chew Sai Nooi (PW1) and was taken out of the trial of Suits 1206, 1208 and 1209 (the related actions). The plaintiffs in the related actions are companies that have common shareholders and directors, notably the family members of Lau Kim Piaw/the plaintiff in Suit 1207/the deceased until the substitution of parties upon his death.

[28] The plaintiff/Lau Kim Piaw entered into four sale and purchase agreements (SPAs) all dated 24 January 1997 with Cherating for the purchase of each floor in the shop lot (the properties) in respect of the land developed by Cherating (the project). The plaintiff allegedly paid Cherating the total price of RM936,580.

[29] The facts as stated in paras. 6, 8 to 12 above similarly applied to this Suit 1207 with such necessary modifications as are required and in particular as follows:

(a) in para. 11.4 above, judgment for a quantified sum of RM644,957.21 for liquidated damages for late delivery of vacant possession as at 30 April 2006.

At The High Court

[30] There were two issues before the High Court which were the same as that enumerated in para. 13 above in respect of the three civil suits by the companies in the related actions.

Valid And Enforceable Contract

[31] The plaintiff only called two witnesses. They were Chew Sai Nooi/executrix/PW1 being the deceased's/plaintiff's wife, and Lau Yam Len (PW2) who was the deceased plaintiff's brother. Notwithstanding the express terms of the SPAs, it was contended by the plaintiff, *vide* the testimony of PW2, that the sale transactions of the properties were actually pursuant to a private arrangement between the plaintiff and Cherating whereby it was agreed that the purchase price for the properties would be to contra with goods delivered by the plaintiff to Cherating for the sum of RM536,000 and the difference of RM400,000 was paid in cash to one Datuk Jeffrey Chuah in the presence of PW2. The plaintiff relied primarily on one letter of acknowledgement dated 13 May 1998 marked IDP 56/IDP 56A issued by Datuk Jeffrey Chuah confirming payment of the properties (the impugned letter).

[32] The learned judge found that the plaintiff had not discharged his burden of proof that he had made payments for the properties for the following reasons:

(a) PW2's contention that he had personal knowledge of the matters pertaining to the sale transaction was found to be inherently improbable for reasons stated in para. 8.1 of the grounds of judgment;

(b) the plaintiff had failed to adduce evidence to prove the facts alleged;

(c) Woolley had successfully adduced evidence to rebut the contents of the impugned letter;

(d) the court refused to admit the impugned letter as an exhibit of the court since it was in Part C of the common bundle of documents where the maker of the impugned letter was not called to testify as to its authenticity and contents; further the impugned letter did not fall under the exception to s. 73A and s. 32 of the Evidence Act;

(e) it was highly improbable for the impugned letter to be accepted as credible evidence since the plaintiff was not listed as purchaser in annexure H to the transfer agreement. Further, the impugned letter was issued on 13 May 1998 when the project was abandoned in 1998, and at the time Woolley took over the project in 2001, Cherating had merely completed the piling works whilst the structural and building works had not been completed. The question therefore arose as to why would the plaintiff want to pay the full purchase price of the properties when the project had not been completed.

[33] In view of the above reasons, the learned judge found that the SPAs were void for want of consideration pursuant to s. 26 of the Contracts Act and that the plaintiff's claim be dismissed.

Privity Of Contract

[34] The learned judge again had made a finding that there was no payment of full purchase price by the plaintiff and since the plaintiff was not listed in annexure H to the transfer agreement, and the plaintiff had not entered into any new sale and purchase agreements with Woolley, there was no privity of contract between the plaintiff and Woolley. The learned judge in doing so distinguished the facts of this case with that of this court's majority decision in *Mikien*'s case *(supra)*. In *Mikien*'s case, Woolley had appealed against the decision of the High Court allowing summary judgment under O. 81 of the Rules of the High Court 1980. This court had dismissed Woolley's appeal for failing to dispute a positive averment by Mikien that Woolley was the successor in title and permitted assign of Cherating and that the purchase price had been paid in full. Whereas in this case, Woolley had disputed that they were the successors in title and permitted assigns of Cherating and thus cls. 41 and 38(f) of the SPAs were not binding on Woolley.

[35] The learned High Court Judge therefore found on the balance of probabilities, the plaintiff had not proven his claim and proceeded to dismiss the plaintiff's claim with costs to be taxed unless otherwise agreed. The plaintiff now appealed to this court against that decision.

Decision Of The Court

[36] As the facts and issues of this appeal were very similar, if not the same, as in Appeal 1822, we adopted our reasons as laid out in Appeal 1822 with such necessary modifications as were required. We therefore dismissed Appeal 1236 with costs of RM15,000 to Woolley/respondent and ordered the deposit to be refunded.

Appeal 774

Brief Facts

[37] In this appeal, the appellants were the plaintiffs in the court below whilst Cherating was the first defendant and Woolley/respondent was the second defendant. We will refer the parties as they were in the court below.

[38] The plaintiffs contended that, pursuant to four sale and purchase agreements dated 3 January 1997 (SPAs), they had agreed to purchase one unit of shop lot comprising of the ground, first, second, and third floors described as Parcel No. 73A at the project developed by Cherating (project).

[39] Pursuant to the SPAs, Cherating agreed to deliver vacant possession of the properties within 36 months of the date of the SPAs. Cherating was liable to pay liquidated and ascertained damages at the rate of 11% per annum for delay in delivering vacant possession (LAD). A

[40] The plaintiffs had paid Cherating RM75,000 being initial deposit towards the purchase price of the properties, which represented 10% of the total purchase price. B

[41] Pursuant to a letter dated 28 May 2001 (D7), Woolley had informed the plaintiffs that it had taken over the project from Cherating. It was contended by the plaintiffs that they had agreed to pay the balance purchase price according to the schedule of payment pursuant to the Third Schedule of the SPAs and that Woolley had agreed to inform the plaintiffs of the progress of the project and the schedule of payment. However, Woolley had failed to issue any notice of payment under the SPAs. Instead, Woolley had completed the project/properties and sold it to third parties without the plaintiffs' knowledge and consent. Woolley therefore had breached the terms of the SPAs and the plaintiffs sought to enforce the SPAs by claiming, amongst others, for an order for specific performance of the SPAs and LAD. C D

[42] The facts pertaining to the abandonment of the project by Cherating, the execution of the transfer agreement dated 20 September 2000, the power of attorney and the deed of novation dated 21 June 2006 referred to in Appeal 1822, (see paras. 8 to 10 above) equally applied to this Appeal 774. The plaintiffs were registered in Schedule H of the transfer agreement. E

[43] It was Woolley's/second defendant's defence that:

(a) the SPAs were entered into between the plaintiffs and Cherating; F

(b) Woolley is not bound by the terms of the SPAs;

(c) by the transfer agreement, Woolley agreed to rehabilitate and complete the project subject to the terms thereof;

(d) the deposit paid by the plaintiffs to Cherating was not forwarded to Woolley; G

(e) Woolley did not enter into any agreement with the plaintiffs and was therefore not responsible for any fulfilment of the terms and conditions of the SPAs. There was no contractual relationship between the plaintiffs and Woolley; H

(f) Woolley had issued a letter dated 28 May 2001 (D7) to the plaintiffs informing them that Woolley had been appointed by Cherating to rehabilitate the abandoned project and advised the plaintiffs to call to fix an appointment; I

(g) on 10 November 2001, Woolley had issued a letter (D11) to the plaintiffs urging them to confirm in writing whether they intended to purchase the properties, failing which Woolley would deem the plaintiffs were no longer interested in the properties;

(h) Woolley denied the plaintiffs' allegation that Woolley had agreed to inform the plaintiffs of the progress of the project and the schedule of payment;

(i) Woolley also denied the plaintiffs' allegation that they were able and ready to pay the balance purchase price.

At The High Court

[44] Three issues were determined by the learned judge as follows:

(a) whether there exists a legal and binding contractual relationship between the plaintiffs and Woolley;

(b) whether Woolley is successor in title or permitted assign of Cherating, thus bound by the terms and conditions of the SPAs; and

(c) whether the SPAs can be specifically enforced against Woolley.

[45] The learned High Court Judge, in answering all the three issues, referred to the letter dated 28 May 2001 (D7), which is reproduced below.

28th May 2001

Mr Tan Boon Seng & 3others
No. 58, Lorong 1/4A,
Taman Wira Jaya
08000 Sungai Petani
Kedah

Re: Purchase Of Shop Office Unit At Raja Uda Commercial Centre, Butterworth, Seberang Perai Utara

Reference is made to the above matter.

We are pleased to inform you that M/s Woolley Development Sdn Bhd is taking over and rehabilitating the abovementioned project from the previous developer, M/s Cherating Development Sdn Bhd.

As purchaser(s) of the above project, you are invited to our office for a further discussion and would appreciate if you could call our Miss Dorothy or Miss Gan at 04 - 323 8199 for an appointment.

We look forward to seeing you soon!

Thank you.

Yours faithfully
WOOLLEY DEVELOPMENT SDN. BHD.

Sgd.

Dorothy Wang
Business Development Manager

The learned High Court Judge found that, when D7 read together with the transfer agreement, Woolley was the successor in title and permitted assign of Cherating. However, the learned judge also found that in view of the peculiar factual background of the case, Woolley was not bound by cl. 41 of the SPAs (that is, that the SPAs shall be binding on the successors in title and permitted assigns of Cherating). The following was what the learned judge held at paras. 42 and 43 of the grounds of judgment:

> 42. So, the second Defendant [Woolley] is the successor in title or permitted assign of the first defendant [Cherating]. Is the second defendant thus bound by the said clause 41 of the original S&P Agreements? (exh P1 A-D). For the peculiar factual background of this case, I take the view that the answer is in the negative. It must necessarily be so, for to rule otherwise it would have lead to an absurdity and injustice to the second defendant as it would have upon the execution of the said Transfer Agreement, immediately and readily be liable to be sued for late delivery as stipulated in clause 7 thereto which spelled out the period of delivery of vacant possession being 36 months. It must be remembered that at the time the second and first defendant executed the said Transfer Agreement on 20.9.2000, the said period of 36 months had long lapsed, that was on the 3.1.2000. Hence, the need for novation of the S&P Agreements as stipulated in clause 4(e) (vii) thereto as was so executed by the 94 other existing purchasers with the first defendant as explained by DW3.
>
> 43. Therefore, the failure of the second Defendant to provide the novation agreement with the existing purchasers within 30 days from the execution of the said Transfer Agreement, must to my mind be viewed with the facts that the plaintiffs had refused to continue with their said S&P Agreements with the second defendant. Clearly, such object of rehabilitation can only to my mind be achieved upon the execution of the novation agreement by the first and second defendant with the existing purchasers. Therefore, until and unless the novation agreement is executed with the existing purchasers, the second defendant cannot be said to have automatically be bound by the terms and conditions of the S&P Agreements between the existing purchasers and the first defendant. The novation agreement must be first executed where parties can novate, alter or rescind the terms of existing S&P Agreements - for example the deposit that had been paid to the first defendant be considered as part of the purchase price of the units to be rehabilitated by the second defendant and the period of the delivery of vacant possession be extended or be calculated from the time of the execution of such novation agreement.

[46] In short, the learned judge found that as there was no novation agreement executed between Cherating, Woolley and the plaintiffs, Woolley was not bound by the SPAs.

[47] With regard to the plaintiffs' assertions that they were never told by Woolley about the need for the plaintiffs to enter into a novation agreement but were instead, as contended by the plaintiffs, told to wait for the notice of the progressive payment to be sent out by Woolley, and that the plaintiffs had never received the *ultimatum* letter D11 dated 10 November 2001, the learned judge chose, on the balance of probabilities, to believe Woolley's version of the matters. The learned judge found that:

(a) although the plaintiffs' address as stated in D11 was clearly different from the plaintiffs' address as stated in the SPAs, but the address as stated in D11 was the same address as used by Woolley in the letter D7 to the plaintiffs' and which had not been disputed to have been received by the plaintiffs;

(b) the plaintiffs had failed to revert with the conclusive option whether to continue or not with the purchase of the properties after asking for time to so decide and after being served with the *ultimatum* letter D11. For ease of reference, D11 is reproduced as follows:

Date: 10 NOV 2001

Tay Boon Seng & Tay Hong San & Tay Boon Kuang & Tay Lay Eng & Tay Boon Siang
No. 58, Lorong 1/4A,
Taman Wira Jaya,
08000 Sungai Petani.

By Registered Mail

Re REHABILITATION OF RAJA UDA COMMERCIAL CENTRE, JALAN RAJA UDA, BUTTERWORTH NOW KNOWN AS WOOLLEY AVENUE, BUTTERWORTH

Sale & Purchase Agreement dated 3rd January 1997 between Tay Boon Seng & Tay Hong San & Tay Boon Kuang & Tay Lay Eng & Tay Boon Siang and M/s Cherating Development Sdn Bhd for property known as: Parcel No. 73A (Ground, 1st, 2nd, 3rd Floor), Block G, Phase 2, Raja Uda Commercial Centre

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Reference is made to the above and our letter dated 28th May 2001 to you, a copy is enclosed for your easy reference.

We have informed you that we have entered into *inter alia* an Agreement for Transfer of Land dated 20 September 2001 with Cherating Development Sdn. Bhd. (CDSB) and a Novation Agreement with CDSB and Malaysia Building Society Berhad, for the

rehabilitation of the abandoned project called Raja Uda Commercial Centre now known as Woolley Avenue to be erected on part of Lot Nos 290, 198, 374, 784, 786, 788 all of Seksyen 2 Bandar Butterworth District of Seberang Perai Utara, Pulau Pinang comprised in Geran No. Pendaftaran 15113, 4500, 14423, 4501, 4502 & 4503 respectively and Lot Nos 564, 670, 674, 1961, 5, 6, 180, 1116 all of Seksyen 3 Bandar Butterworth District of Seberang Perai Utara, Pulau Pinang comprised in Geran No. Pendaftaran 15168, 4510, 4511, 13786, 4508, 13528, 4509, 41165 respectively (the Land).

The parties are in the process of effecting the transfer of the Land from CDSB to us. All relevant parties have duly executed all the necessary transfer forms in Borang 14A under the National Land Code and they are in our solicitors' possession pending removal of private caveats for registration of transfer.

Further to the Meeting held between your goodself and our Business Development Manager, Ms Dorothy Wang on 1st June 2001, you are requested and have promised to revert to us whether you are interested to continue with the purchase of the shop office. However, we regret to note that you have failed to favor us with a reply till to date.

TAKE NOTICE that unless you let us have your written confirmation as to whether you are still interested in purchasing the shop office within fourteen (14) days from the date hereof, it is deemed that you have unconditionally and irrevocably waived your title rights interest in respect of the shop office and we shall have the liberty to dispose off the shop office to anyone without further reference to you.

Yours faithfully

Woolley Development Sdn Bhd

Sgd.

…

Director

Encl/-

c.c. Cherating Development Sdn Bhd
Malaysia Building Society Berhad

(c) there was no reason for DW3 to inform the plaintiffs to wait for the notice of the progressive payment when the transfer agreement clearly provided that the novation agreements that were to be executed with the existing purchasers was a condition precedent before the rehabilitation works could commence;

(d) there was no reason for Woolley to turn the plaintiffs away knowing very well that the plaintiffs were ready buyers of the properties to be rehabilitated.

[48] The learned High Court Judge therefore dismissed the plaintiffs' claim in its entirety with costs of RM20,000 awarded to Woolley. The plaintiffs now appealed to this court against that decision.

Decision Of The Court

[49] The plaintiffs' main ground of appeal was that the learned High Court Judge had seriously erred in law for breaking the doctrine of *stare decisis* by refusing to follow this court's decision in *Mikien*'s case *(supra)* where the majority decision found that Woolley had never disputed it was the successor in title and permitted assign of Cherating, thus by virtue of cl. 41 and cl. 38(f), the SPAs were binding upon Woolley. Even though in this case the learned judge made a finding that Woolley was the successor in title to Cherating, he, however, failed to hold the SPAs were binding on Woolley. In doing so, the learned judge had departed from this court's decision in *Mikien*'s case and therefore the learned judge's decision was plainly wrong in law and should be corrected on appeal.

[50] As we had indicated before, and as found by the learned High Court Judge, the facts in *Mikien*'s case could be distinguished from the facts of this case. In the *Mikien*'s case, this court had dismissed Woolley's appeal primarily for failing to dispute a positive averment by Mikien (raised in affidavit in the course of the summary judgment application) that Woolley was the successor in title and permitted assign of Cherating and that the purchase price had been paid in full. Unlike *Mikien*'s case, in this case Woolley had categorically disputed the plaintiffs' assertion that the SPAs were binding by virtue of cls. 38 and 41 therein and specifically pleaded that the plaintiffs had no right to enforce the SPAs against Woolley. The learned High Court Judge similarly had this to say on *Mikien*'s case, at paras. 36 and 37 of the grounds of judgment, and we agreed with him:

> 36 There can be no doubt that by doctrine of *'stare decisis'*, this court is bound by the decision of the higher court. Nevertheless, upon carefully reading the judgment of the said *Mikien*'s case, which was a judgment arising out of that affidavit based application under Order [81] *[sic]* of RHC, it is observed that the majority decision in affirming the decision of the High Court in allowing such application is premised upon the fact that Woolley there had never disputed by not replying the Mikien's affidavit which averred Woolley being the successor in title and permitted assign of Cherating. It was upon this undisputed fact that the majority decision held that Woolley was thus bound by the terms of the S&P Agreements and that it was untenable for Woolley to claim that there was no privity of contract between Mikien and Woolley. As to the question of novation, it was held by the majority decision that it is one of facts and not of law. Woolley was barred by the Court of Appeal from arguing on this point of facts since the same was not raised before the High Court.

37. So, it is clear therefore that I am only bound by the majority decision in that *Mikien*'s case in so far as it was held that the point of novation was one of facts and not of law.

[51] With regard to the issue of the plaintiffs' refusal to enter into novation agreements with Woolley, it was argued by the plaintiffs in the main that:

(a) the learned High Court Judge had misdirected himself in holding that there were novation agreements entered between Woolley and the other purchasers when a perusal of the oral and documentary evidence clearly proved to the contrary;

(b) Woolley only wrote to the plaintiffs *vide* letter D7 dated 28 May 2001 informing them that Woolley had taken over the project from Cherating;

(c) the plaintiffs denied receiving the *ultimatum* letter D11 as the address therein was the wrong address of the plaintiffs under the SPAs;

(d) the learned judge was wrong in qualifying the admission of Woolley's witness, DW2, that the *ultimatum* letter D11 was a termination letter of the SPAs and holding that D11 was merely asking the plaintiffs whether they intended to proceed with the purchasers or not;

(e) Woolley had, by sending D11 to the plaintiffs, wrongfully terminated the SPAs and in clear breach of the SPAs had sold the properties to third parties.

[52] As we had earlier stated, it is trite law that an appellate court should be slow to intervene/overturn the finding of facts by the trial judge. Having perused the appeal record and submissions of the parties, we did not see any need to differ from the learned High Court Judge's findings of facts as alluded to in paras. 45, 46 and 47 above. Moreover, the plaintiffs could not reprobate and approbate the *ultimatum l*etter D11 in the sense that they had denied receiving it (which we agreed with the finding of the learned judge that they did receive it) and yet went on to argue at length that D11 was a termination letter of the SPAs and that Woolley had wrongfully terminated the SPAs and sold the properties to third parties (see *Affin Bank Bhd v. Mohd Kassim Ibrahim* [2013] 1 CLJ 465; *Tan Hood Keng v. ARP Aroonasalam Chetty & Anor* [1912] 1 LNS 2; [1934] MLJ 166; *Vershures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd.* [1912] 1 LNS 2; [1921] 2 KB 608).

[53] In view of the above, we found there were no merits in this appeal and we unanimously dismissed Appeal 774 with costs of RM15,000 to Woolley/respondent. We ordered the deposit be refunded.

Conclusion

[54] Based on our reasonings in respect of each appeal, we therefore unanimously decided as follows:

A (a) in respect of Appeal 1822, the appeal was dismissed with costs of RM15,000 to Woolley/the respondent and the deposit be refunded;

(b) in respect of Appeal 1236, the appeal was dismissed with costs of RM15,000 to Woolley/respondent and the deposit be refunded;

B (c) in respect of Appeal 774, the appeal was dismissed with costs of RM15,000 to Woolley/respondent and the deposit be refunded.

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